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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/835,121	04/13/2001	Margaret M. Leahy	OSJ-002	4218
959 7590 05/30/2007 LAHIVE & COCKFIELD, LLP ONE POST OFFICE SQUARE BOSTON, MA 02109-2127			EXAMINER HOFFMAN, SUSAN COE	
			ART UNIT 1655	PAPER NUMBER
			MAIL DATE 05/30/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

09/835,121

Applicant(s)

LEAHY ET AL.

Examiner

Susan Coe Hoffman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 11, 14 and 21-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 11, 14 and 21-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>5-06</u> . | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March 16, 2007 has been entered. The text of those sections of Title 35, U.S. Code, not included in this action can be found in a prior Office action.
2. Claims 11, 14, 21-25, and 27-32 are pending.
3. In Paper No. 5, applicant elected with traverse phenolic acid, specifically cinnamic acid for species D.
4. Claims 11, 14, and 21-33 are examined on the merits solely in regards to the elected species.

### ***Claim Rejections - 35 USC § 102***

5. Claims 11, 14, 21-25 and 27-32 are rejected under 35 U.S.C. 102(b) as being anticipated by US Pat. No. 5,320,861 for the reasons set forth in the previous Office action.

All of applicant's arguments regarding this ground of rejection have been fully considered but are not persuasive. Applicant argues that US '861 does not teach the claimed cranberry extract because the cranberry extract in US '861 is not enriched above and beyond the amounts found in a cranberry presscake. However, applicant's specification admits that the

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Tomah presscake of US '861 *is* enriched above and beyond a conventional cranberry presscake.

This is explicitly stated on page 6 of the specification:

The term "Tomah presscake" refers to a particularly preferred presscake described in U.S. Patent Nos. 5,320,861 and 5,320,861 [sic] which contains **higher levels of desirable phytochemicals** than are present in presscake made via conventional methods. In particular, decharacterized cranberry fruit in the form of "Tomah presscake" contains higher levels of anthocyanins, **phenolic acids** and proanthocyanidins than that found in presscake produced through conventional methods...The term "**phenolic compound**" refers to...**cinnamic acid**...(see page 6, lines 3-8, 15 and 19, emphasis added)...

In addition, Table 12 of applicant's specification compares the Tomah presscake with a conventional presscake and shows that the Tomah presscake is enriched in phenolic acids. Thus, since the product of US '861 is enriched above a conventional presscake, the claimed composition is considered anticipated by the product of US '861.

Applicant also argues that the product of US '861 does not teach isolating the claimed compounds in "sufficient and pure quantities" above and beyond the compounds found in the Tomah presscake. However, applicant's claims currently do not claim isolated compounds. In fact, applicant has previously argued that the term "cranberry extract enriched for" does not read on the isolated compounds (see applicant's response submitted June 6, 2005). No where does applicant's specification state that they produced a cranberry extract that was enriched in phenolic acids in amounts greater than those found in US '861. The specification only teaches that active compounds can be isolated from the Tomah presscake of US '861. The current claims do not claim isolated compounds. In addition, even if the claims did read on isolated compounds, the elected compound, cinnamic acid, is a well known chemical (see Office actions of March 27, 2002 and August 18, 2003).

In addition, applicant argues that the Tomah presscake of US '861 does not comprise the novel ratios of compounds found in the current invention. However, applicant has not claimed any specific ratios. Applicant also argues that US '861 does not teach using the product in an amount effective to product the claimed effects on cancer or hypercholesterolemia. However, all of applicant's examples of biological activity specifically use the product of US '861. Thus, the product of US '861 clearly would have the same biological activity as claimed in the current composition. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Thus, the claimed product clearly is anticipated by the product of US '861.

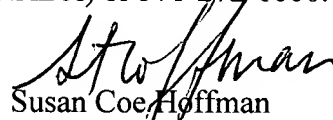
6. No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan Coe Hoffman whose telephone number is (571) 272-0963. The examiner can normally be reached on Monday-Thursday, 9:30-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Susan Coe Hoffman  
Primary Examiner  
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